Supreme Court, U.S.
FILED
NOV 17 2004
OFFICE OF THE CLERK

No. 03-1395

In the

Supreme Court of the United States

GEORGE J. TENET, individually, PORTER J. GOSS, Director of CENTRAL INTELLIGENCE and DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY, and UNITED STATES OF AMERICA,
Petitioners,

v.

JOHN DOE and JANE DOE,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

Steven W. Hale
Counsel of Record
David J. Burman
Elizabeth A. Alaniz
Marie Aglion
PERKINS COIE LLP
1201 Third Ave., Suite 4800
Seattle, WA 98101-3099
(206) 359-8000
Attorneys for Respondents

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether *Totten v. United States*, 92 U.S. (2 Otto) 105 (1875), empowers the Executive in a case presenting colorable constitutional claims to deprive courts of subject matter jurisdiction and to circumvent the requirements of the state secrets privilege and the procedural safeguards of *United States v. Reynolds*, 345 U.S. 1 (1953), based solely on the Executive's unilateral and conclusory assertion that disclosure of state secrets is inevitable.

CONTENTS

I. STATEMENT OF THE CASE 1
- A. Background 1
- B. Internal Agency Proceedings 5
- C. [illegible]ceedings in the District Court 8
- D. Proceedings in the Ninth Circuit 11

II. SUMMARY OF THE ARGUMENT 12

III. ARGUMENT 15
- A. The Executive Mischaracterizes This Case 15
- B. This Case Can Be Resolved Without Disclosure of State Secrets 17
- C. The Executive's Proposed Reading of *Totten* Violates the Constitution and Principles of Separation of Powers 18
- D. Dismissal of This Case on Jurisdictional Grounds Is Incompatible With the Principles Embodied in the State Secrets Privilege 24
- E. This Court and Circuit Courts Have Not Treated *Totten* as a Jurisdictional Bar 26
- F. *Totten* Does Not Support the Executive's Extreme Position 29
- G. The State Secrets Privilege Is Fully Adequate to Accommodate the Executive's Concerns, and the Executive Fails to Show Otherwise 30

H. The Court's Decision in *Webster* Refutes the Executive's Premise That the Judiciary Cannot Perform Its Constitutional Function in Cases Involving the CIA and Its Covert Intelligence Activities 36

I. The Record of the Executive's Conduct in This Case Cautions Against Granting the Executive the Absolute Authority It Demands 38

IV. CONCLUSION 44

TABLE OF AUTHORITIES

Cases

Air-Sea Forwarders, Inc. v. United States, 166 F.3d 1170 (Fed. Cir. 1999) 28

Baker v. Carr, 369 U.S. 186 (1962) 16

Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667 (1986) 36

Cheney v. United States Dist. Court for Dist. of Columbia, 124 S. Ct. 2576 (2004) 22

CIA v. Sims, 471 U.S. 159 (1985) 34

Clift v. United States, 597 F.2d 826 (2d Cir. 1979) 29

Ex parte Milligan, 71 U.S. (4 Wall) 2 (1866) 19

Farnsworth Cannon, Inc. v. Grimes, 635 F.2d 268 (4th Cir. 1980) 29

Fitzgerald v. Penthouse Int'l, Ltd., 776 F.2d 1236 (4th Cir. 1985) 29, 31

Guong v. United States, 860 F.2d 1063 (Fed. Cir. 1988) 27, 28, 37

Halkin v. Helms, 598 F.2d 1 (D.C. Cir. 1978) 35

Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) ..... passim

Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934) 21, 24

In re Sealed Case, 121 F.3d 729 (D.C. Cir. 1997) 27

Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221 (1986) 17

Kasza v. Browner, 133 F.3d 1159 (9th Cir. 1998) 31

Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) 20

Kerr v. United States Dist. Court for N. Dist. of Calif., 426 U.S. 394 (1976) 34

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 19
McDonnell Douglas Corp. v. United States, 323 F.3d 1006 (Fed. Cir. 2003) 28
Military Audit Project v. Casey, 656 F.2d 724 (D.C. Cir. 1981) 34
Mistretta v. United States, 488 U.S. 361 (1989) 21
Monarch Assurance P.L.C. v. United States, 244 F.3d 1356 (Fed. Cir. 2001) 28
Myers v. United States, 272 U.S. 52 (1926) 22, 24
Rubin v. United States ex rel. Indep. Counsel, 119 S. Ct. 461 (1998) 27
Totten v. United States, 92 U.S. (2 Otto) 105 (1875) ..... passim
United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) 24
United States v. Nixon, 418 U.S. 683 (1974) 18, 34
United States v. Reynolds, 345 U.S. 1 (1953) ..... passim
United States v. Robel, 389 U.S. 258 (1967) 20, 24
Webster v. Doe, 486 U.S. 592 (1988) ..... passim
Weinberger v. Catholic Action of Haw./Peace Educ. Project, 454 U.S. 139 (1981) 29
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 20
Zuckerbraun v. Gen. Dynamics Corp., 935 F.2d 544 (2d Cir. 1991) 27
Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975) 27

Statutes

5 U.S.C. § 701(a)(2) 36
18 U.S.C. § 793 35
18 U.S.C. § 794 35
50 U.S.C. § 403 40

50 U.S.C. § 403h 39, 41, 42

Regulations and Rules

Fed. R. Civ. P. 12(b)(1) and (6) 8
Fed. R. Civ. P. 34 ..... 9, 45
Fed. R. Civ. P. 56 45
PL-110 Regulations ..... passim

Constitutional Provisions

U.S. CONST. art III, § 1 18
U.S. CONST. art. II, § 1 24
U.S. CONST., art. II, § 3 24

Treatises

L. Oppenheim, *International Law – A Treatise* 862 (8th ed. 1955) 33

Other Authorities

Kohn & Harafan, *Strategic Air Warfare* (Office of Air Force History) United States Air Force (1988) 25
Secrets of the Cold War, U.S. News & World Rep. (Mar. 15, 1993) 25
Symposium at Strategic Air Command Museum, *Cold War in Flames: The Untold Story of Airborne Reconnaissance* (Sept. 12, 1998) 25
The Federalist No. 47 (James Madison) 19, 22

I. STATEMENT OF THE CASE

John and Jane Doe, Respondents in this proceeding, are United States citizens residing in the United States. The Does seek in this action to compel the CIA to provide a procedurally fair and lawful *internal* agency hearing to address their claims for assistance and personal security. (App. 9a, 117a-142a; R.App. 3-4)[1] The Does assert constitutional claims involving violations of property and liberty interests under the Fifth Amendment of the Constitution. (App. 6a, 136a-137a)

The Does are proceeding under pseudonyms and without disclosing any classified information. The CIA has pre-approved for filing the complaint and every brief, declaration, and document the Does have filed, including this brief. (App. 22a-23a; J.App. 31)[2]

Rather than asserting the state secrets privilege to address its alleged concerns, the Executive seeks dismissal of this action based on nothing more than its unilateral and conclusory assertion that state secrets inevitably will be revealed if the case goes forward. The Executive thus seeks to exclude the Judiciary from any consideration of whether the Does' constitutional claims can go forward. The district court and Ninth Circuit properly rejected the Executive's contention that the Judiciary is institutionally incapable of dealing with cases touching upon matters of national security. Both the district court and Ninth Circuit were careful to provide the Executive an opportunity to assert the state secrets privilege, noting the significant deference to which assertion of the privilege would be entitled.

A. Background

The Does are former Cold War defectors who were coerced by the CIA into being intelligence sources. John Doe was a high-ranking diplomat for a country considered an

---

[1] "App." refers to the separately bound appendix submitted with the Petition for a Writ of Certiorari. "R.App." refers to the separately bound appendix submitted by the Does with the Response to Petition for Writ of Certiorari.

[2] "J.App." refers to the separately bound appendix submitted with the Brief for the Petitioners.

enemy of the United States during the Cold War. For a period during the Cold War, John Doe and his wife were posted on a diplomatic mission in a third country, where John Doe held a senior diplomatic assignment. The Does resided in their country's embassy compound and were subject to constant surveillance by that nation's security service. Well-educated and successful in their own society, the Does were nonetheless disenchanted with Communism. During John Doe's diplomatic posting, the Does approached a person known to them to be attached to the United States embassy and requested assistance in defecting to the United States. The Does had no interest in conducting espionage. (App. 121a-122a; R.App. 1-2, ¶¶ 2-4)

CIA agents intervened, taking the Does to an Agency safe house where they were held for nearly 12 hours, time sufficient to create extreme danger of exposure. The Agency officers employed intimidation and coercion to cause the Does to remain at their diplomatic post and conduct espionage for the United States for a period of time. The Agency officers stated that after this period the Agency would arrange for travel to the United States and ensure financial and personal security for life. The Agency officers professed that such support was "required by law." As with any agent recruitment at this high level, the commitments made were approved at the highest level of authority at the Agency. The Does resisted the requests of the agents, stressing that all they sought was assistance in defecting. The agents persisted, using tactics that induced great fear and uncertainty in the Does. Believing that they had no real choice, the Does reluctantly proceeded to work "in place" for the United States. (App. 122a-123a; R.App. 2-3, ¶¶ 3-4, 66-67)

After doing what was requested of them at great personal risk and for the time period that the agents had said was required to obtain assistance and Agency protection, the Does requested that the Agency arrange for their defection and travel to the United States. Instead of making the arrangements, the Agency pressured the Does into undertaking espionage that would expose the Does to far greater danger and virtually guaranteed that their activities would become known to the first nation, putting them at lifelong risk of retaliation, including assassination. Again, believing they had no choice, the Does complied with the

Agency's demands for progressively more dangerous activities. (App. 123a; R.App. 3, ¶¶ 5-6)

After performing these highly dangerous and valuable assignments, the Does were eventually brought to the United States and provided new identities and false backgrounds by the Agency. The Agency offered to "retire" the Does with financial and health benefits, but the Does desired to work and become integrated into American society. (App. 123a; R.App. 3)

Throughout the resettlement process, as they had done before, Agency officials stated to the Does that the Agency would provide a "safety net" for life of financial assistance, health care, and personal security, stating that this was "required by law" and by the fact that the Does had "PL-110 status."[3] As soon as permitted by law, the Does became United States citizens. (App. 122a-125a; R.App. 2-6)

With his false identity and false background and only with the Agency's assistance, John Doe found employment. (App. 124a; R.App. 4, ¶ 8) After a number of years of successfully supporting himself and Jane Doe, John Doe lost his job due to circumstances unrelated to his job performance. (App. 125a; R.App. 5, ¶ 13) Pursuant to prescribed procedures, the Does contacted the Agency and requested assistance. They received no response for nearly four months. When a response did come, the Agency's letter expressed gratitude and respect for past services to the United States but indicated regret that no funds were available due to "budget constraints." (App. 128a; R.App. 6, ¶¶ 14-15) No other reason was given for not assisting the Does. The Agency's letter, which, again, has been cleared by the Agency for public filing, stated in part:

> 5 June 1997
>
> Dear ***
>
> Thank you for your letter and resume. We are very sorry that it has

---

[3] The CIA administers a program referred to as "PL-110" that involves (a) bringing into the United States a very limited number of defectors and certain other "essential aliens" outside normal immigration procedures and (b) the provision of assistance and security to these people. (App. 3a, 87a, 123a; R.App. 24-31) The Does have "PL-110 status." (R.App. 23)

taken this long to respond to your telephone calls and letter, but we have been in a state of transition and have been unable to give your problem our fullest attention until recently. . . . [W]e sympathize with the situation you find yourself in but regret that due to our budget constraints, we are unable to provide you with additional assistance. . . .

We want you to know that this office has great respect for the people we serve and we remain grateful for your past service to this country. We continue to be concerned for your security and welfare and would hope to be flexible should you require assistance in the future. Again, we wish you and your family every success.

Sincerely, /s/ * * *

(R.App. 16-17)

John Doe's efforts to find new employment were restricted by his security arrangements with the Agency to a certain segment of the employment marketplace, and this segment was in general contraction nationwide. The Agency's security arrangements also required John Doe to continue to use the false name and false background created by the Agency, and the Agency refused to assist, as it had in the past, to facilitate employment opportunities, for example, by talking with senior management of potential employers, and to mitigate the problems presented by John Doe's situation, including his false credentials. John Doe's efforts to find new employment also were limited by his age and his poor health. (App. 125a; R.App. 5-7)

In an effort to reduce their cost of living to a minimum, when John Doe's unemployment benefits ran out, the Does temporarily left the United States to live with an aging relative in a former Eastern Bloc country in near subsistence-level conditions. This act of desperation greatly increased the risk to the Does' personal security, given the sanctions imposed by the former country of death or life imprisonment

as a result of having conducted espionage activities for the United States. (R.App. 7-8; App. 123a, 126a) During this time, John Doe came into direct contact with a person known to be, at least in the past, an officer of the state security service for the Does' former country. The combination of a grave concern for their personal security and the need for competent medical treatment for health issues prompted the Does to return to the United States. The Does subsisted on their modest retirement savings and temporary work they obtained. (App. 127a; R.App 8-9) Despite the considerable obstacles he faced, John Doe continued to seek employment. (App. 129a; R.App. 7, ¶ 20)

B. Internal Agency Proceedings

When further attempts at obtaining Agency assistance failed, the Does sought and obtained pro bono legal representation. The Agency subsequently granted the Does' counsel security clearances to represent the Does. (App. 129a; R.App. 6, ¶ 16, 18, ¶ 2)[4] The Does' counsel were provided with the Agency's unclassified Security Guidance for Representatives in connection with their security clearances. (J.App. 27-32)

In 1997, in conjunction with the granting of security clearance to the Does' counsel, an attorney from the CIA's Office of General Counsel explained to the Does' counsel that the Agency's refusal to provide further benefits was based on its unilateral, after-the-fact, subjective evaluation of the services performed by the Does and that the Agency had determined that the benefits previously provided were "adequate" for the "services rendered" and that the Does would receive nothing further. (App. 129a; R.App. 18-19) There was no mention of the previously cited "budget constraints."

The lawyer from the CIA General Counsel's office advised that the Does could "appeal" the decision to the Director of Central Intelligence ("DCI"), but was unable to respond to counsel's questions, including questions about procedures involved in an appeal to the DCI, because she

---

[4] Security clearances were granted to Steven W. Hale and Elizabeth A. Alaniz. As this case grew in complexity, additional persons worked on the Does' case but were not privy to classified information.

said she was "just a messenger." The Does' counsel requested an opportunity to meet with a more senior Agency lawyer and with an Agency person who was substantively knowledgeable. These requests were denied or ignored. (App. 129a-130a; R.App. 18-20)

Pursuant to the Agency's cursory instructions, the Does prepared a detailed "appeal" based on the "value of the services performed" and delivered it to an Agency courier as the Agency instructed. In connection with this effort, the Does' counsel repeatedly requested from the Agency copies of regulations governing the appeal process, the PL-110 rules and regulations, and access to records potentially relevant to this matter that were classified within the level of security clearances granted the Does' counsel. These requests were ignored or denied. (App. 130a-131a; R.App. 18-20)

At the same time the Does filed their appeal to the DCI, the Does requested an independent review by the Agency's Inspector General ("IG"). This request for IG review and the follow-up request to which no response was received have not, to the Does' knowledge, ever resulted in any review by the IG. Certainly, the Does have never been advised of such a review by the IG or the outcome. (App. 130a-131a; R.App. 20)

Subsequently, Agency counsel orally advised the Does' counsel that the Deputy Director of Operations (not the DCI) had denied their appeal. (App. 131a; R.App. 20) Agency counsel advised that a further appeal was possible to the Helms Panel, a panel of former Agency officials. Confused about the appeal process, given the inconsistent and contradictory oral information provided by the Agency, the Does again requested copies of the regulations or rules governing appeals and written confirmation of the Agency's appeal determination. Both requests were ignored. (App. 131a; R.App. 20)

Despite the severe limitations imposed by the Agency's conduct, the Does nonetheless pursued an appeal to the Helms Panel with a written appeal statement. The Does again requested access to documents and persons and copies of pertinent regulations. All requests were denied or ignored. The Does' counsel additionally repeatedly requested an opportunity for the Does, or at a minimum, their cleared counsel, to appear before the Helms Panel and present their

case. The Does' counsel also requested the opportunity to confront witnesses, whose identities could, if needed, be concealed. These requests were directed both to the Agency and the Helms Panel. All such requests were either denied or ignored. (App. 131a-132a; R.App. 21) The Helms Panel review thus proceeded without participation by the Does, other than the previously prepared appeal statement, which the Does later learned was directed to the wrong issues because of misinformation provided by the CIA. (App. 87a-88a, 131a-133a; R.App. 21, 41-51)

Agency counsel subsequently told the Does' counsel orally that the DCI had determined, based on the Helms Panel recommendation, that the Agency should provide certain benefits to the Does for no more than one year, and nothing thereafter. (App. 132a; R.App. 21) Agency counsel also subsequently advised that in order to accept the benefits of the DCI's decision, the Does would have to execute complete releases. The Does' counsel requested clarification of whether the appeal process, including the DCI's decision, was an adjudication of the Does' rights, and if so, how it could be predicated on a demand for a release. The Agency did not respond. (App. 132a; R.App. 22) The additional benefits were not provided.

Although the Agency refused to provide a copy of the DCI's decision, one of the Does' cleared counsel was permitted to read the written decision at a secure location. The document bore no classification. The DCI's written decision did not state the reasons for rejecting the legal arguments and factual assertions advanced by the Does in their appeal or the evidence relied upon. In addition, the Does' counsel were also permitted to read a document that purported to be the minutes of the Helms Panel proceeding, which was short and lacking in detail. The brief summary of the statements of three persons who appeared before the Helms Panel contained information that was incomplete and misleading, except that one person testified that she had explained to the Does that PL-110 status is a lifelong commitment for security. (R.App. 21-22)

The Does' counsel's further attempts to discuss the merits of the dispute with the Agency were ignored or denied by the Agency. Finally, when the Does' counsel stated to an Agency lawyer that the Agency's failure to provide a fair process and apply accepted legal principles left the Does with no option

but to go to court, the Agency lawyer's response was a confident "how are you going to get around *Totten*?" (R.App. 22) with the clear implication that the Agency considered itself immune from judicial scrutiny.

C. Proceedings in the District Court

By then in dire circumstances, and having exhausted the only administrative process they were given, the Does filed suit alleging violations of their substantive and procedural due process rights, based both on property and liberty interests, and seeking a constitutionally adequate internal CIA process, including a declaration that the CIA is required to follow substantive law. (App. 117a-142a)

The Executive moved to dismiss under Fed. R. Civ. P. 12(b)(1) and (6), emphatically denying the existence of any legal source of entitlement to assistance for persons in the Does' position, and asserting that national security and *Totten* precluded the court from considering the Does' case. The Executive did not assert the state secrets privilege.

The district court denied the Executive's motion, finding that "litigation of plaintiffs' claims will not require public revelation of the defendants' intelligence gathering methods," noting the Court's recognition in *Webster v. Doe*, 486 U.S. 592, 604 (1988), that "the District Court has the latitude to control any discovery process which may be instituted so as to balance [plaintiffs'] need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission." (App. 106a-107a) The district court further observed that the Executive had reviewed and pre-approved for public filing all papers and that it "could request leave to submit materials in this matter under seal or *in camera*, or may assert the state secrets privilege recognized in *United States v. Reynolds*, 345 U.S. 1, 7-8 . . . (1953)." (App. 107a) The district court also found that "the public interest will not be harmed" because the court "understands the need for confidentiality and has the power to allow motions to be filed under seal and heard in closed hearings." (App. 93a)

The Executive then filed a "Motion for Summary Judgment or in the Alternative, Renewed Motion to Dismiss." The Executive still did not assert the state secrets

privilege. Having feigned ignorance about a "PL-110 program" in its first motion, remarkably in its second motion the Executive admitted the existence of a program for resettlees[5] under the statute "commonly known" as "PL-110" and the existence of regulations governing it. (App. 87a-88a, 144a) The Executive's motion relied on a declaration by a mid-level Agency official (William McNair, an "Information Review Officer") who offered his legal conclusion that applicable regulations—which had not been provided to the Does or to the court—provided the Does no rights. (App. 145a)

The Executive's filing of a declaration containing various factual assertions effectively negated the parties' agreement to proceed without discovery until the jurisdictional issue was resolved. Accordingly, the Does sought production under Fed. R. Civ. P. 34 of the regulations referenced in the McNair Declaration and noted his deposition. Without moving for a protective order, the Agency produced a redacted version of selected portions of the PL-110 regulations and made Mr. McNair available for deposition. (R.App. 41-50)

This limited discovery, all accomplished without the Executive asserting the state secrets privilege, established that PL-110 regulations provide that the "*safety and security*" of resettlees are the "*continuing responsibility of CIA*" (R.App. 49-50) (emphasis added) and provide for continued financial assistance after resettlees obtain U.S. citizenship, and for life, if appropriate, due to *age, health or financial need* (R.App. 41-50); that the standard for obtaining benefits under the PL-110 program is *not* the "value of services" standard the CIA had advised the Does applied to their administrative appeal (R.App. 19); and that regulations exist but were not produced relating to the determination of benefits to resettlees and resolution of grievances. (R.App. 97-99)

Mr. McNair also testified that he was involved on behalf of the CIA in judicial proceedings involving classified information on a regular basis. (R.App. 68-71) Mr. McNair further admitted that his declaration was drafted by Agency lawyers and he was unable to identify what portion was in

---

[5] Resettlees is the word used by the CIA for defectors. (R.App. 61-64)

fact his testimony and what was the lawyers' testimony. (R.App. 90-91) Although Mr. McNair admitted the existence of additional regulations, the Executive refused to produce any such documents in response to the Does' requests, even in redacted form, and even declined to permit the Does' cleared counsel to review any of the regulations in a secure location. (J.App. 41-46) The Executive initially justified its refusal to allow the Does' counsel to review the unredacted version of the produced PL-110 regulations and the non-produced PL-110 regulations on the ground that the Does' counsel's security clearances were issued only for the Agency administrative process and had expired. (J.App. 43)

The Executive later retracted this assertion, confirmed that the clearances were still in effect, but claimed the information was being withheld because the Agency had made a unilateral determination that the Does' counsel "did not have a need to know." (J.App. 33-34) The Agency even refused to allow the Does' cleared counsel to review documents previously shown to them and refused to allow the Does' counsel access to their own notes, which had been retained by the CIA, contrary to the express terms of the Security Guidance for Representatives provided to the Does' cleared counsel. (J.App. 27-34, 41-46)

Despite the Executive's refusal to produce the requested PL-110 regulations or make them available for review at a secure location, several days later the Executive filed a reply brief in support of its motion for summary judgment, attaching yet another previously undisclosed regulation.

The district court denied defendants' second motion, noting that:

> [i]n their first motion to dismiss, defendants claimed not to know what PL-110 was. Now, they acknowledge not only the existence of PL-110, but also the existence of CIA internal regulations concerning the PL-110 program and the financial benefits accorded to defectors. . . . Defendants' initial denial of knowledge of PL-110, followed by their subsequent acknowledgment of PL-110 and related regulations, **weaken their credibility**.

(App. 87a-88a (footnote omitted) (emphasis added))

After the second denial of the motion to dismiss, the Executive moved for leave to file an interlocutory appeal. The district court granted the motion and stayed proceedings in the district court. (App. 79a)

D. Proceedings in the Ninth Circuit

The Ninth Circuit affirmed in a 2-1 decision (App. 1a-64a), rejecting the Executive's argument that *Totten* requires dismissal of this case on jurisdictional grounds and holding that this case is governed by the state secrets privilege. (App. 18a) The Ninth Circuit acknowledged that "it could very well turn out, after further district court proceedings, that the Does will still be left without redress even if everything they allege is true." (*Id.*) The court observed that because the "net result of refusing to adjudicate the Does' claims is to sacrifice their asserted constitutional interests to the security of the nation as a whole, both the Executive and the courts need to consider discretely, rather than by formula, whether this is a case in which there is simply no acceptable alternative to that sacrifice." (App. 19a) The opinion noted that "[s]tate secrets privilege law prescribes that courts must be sure that claims of paramount national security interest are presented in the manner that has been devised best to assure their validity and must consider whether there are alternatives to outright dismissal that could provide whatever assurances of secrecy are necessary." (*Id.*) The Ninth Circuit also concluded that this "counterweight role has been reserved for the judiciary [and the judiciary] must fulfill it with precision and care, lest we encourage both executive overreaching and a corrosive appearance of inequitable treatment of those who have undertaken great risks to help our nation, an appearance that could itself have long-run national security implications." (*Id.*)

The Ninth Circuit denied the Executive's motion for rehearing or alternatively for rehearing *en banc*. Writing in dissent, Judge Kleinfeld observed, "I hope that the Does' account is fictional (though I do not intimate that it is, having no knowledge). Little could be worse for our ability to engage spies than insecurity about whether they will get what

was promised to them. If what the Does allege is true, a serious injustice has been done to them, and the injustice to them is seriously harmful to the long-term security interests of the United States."[6] (App. 75a)

II. SUMMARY OF THE ARGUMENT

The Does seek to compel the CIA to provide a procedurally fair internal agency hearing for their claims for assistance and personal security, and a declaration that the Agency is required to comply with substantive law in addressing these claims. (App. 117a-142a) The Does have taken every precaution to avoid disclosure of state secrets. It is difficult to conceive of a case in which greater respect for state secrets could be shown. Apart from the limited nature of the relief they seek—a fair and lawful hearing within the CIA—it is uncontested that their complaint and other public filings allege no classified facts. Indeed, the Agency has pre-approved all filings. This approach protects against disclosure of any classified information.

The Executive insists that this case necessarily will reveal state secrets if it goes forward yet it has chosen not to assert the state secrets privilege, preferring instead to advocate a different and previously unrecognized rule that would deprive the courts of subject matter jurisdiction over this case based solely on the Executive's unilateral and conclusory assertion that disclosure of state secrets is inevitable.

The district court correctly found that it was *not* inevitable that state secrets would be revealed if the case went forward, and the Ninth Circuit agreed. (App. 35a-38a,

---

[6] The serious injustice to the Does that Judge Kleinfeld noted has been aggravated by the over seven-year delay since the Does first sought assistance from the Agency in 1997, with no opportunity for the Does to address the merits of their case, notwithstanding the showing of extreme hardship (R.App. 1-10) evidenced by the Ninth Circuit's order expediting the appeal. (R.App. 39) Adding to this injustice is the fact that if the Does had not located counsel to handle their case pro bono (at a cost so far of over $1.9 million), they would have had no way to pursue this case given the Executive's steadfast resistance to providing them even a remotely fair hearing. Access to justice should not be so delayed or so costly, particularly where constitutional liberty and property interests are involved.

106a-107a) The Court of Appeals was careful to provide the Executive an opportunity to assert the privilege (App. 39a) (directing the district court on remand to allow the CIA the opportunity to assert the state secrets privilege). In so doing, it made clear the substantial deference to which a claim of privilege would be entitled, and that the Does' interests ultimately might have to yield to the "larger public good." (App. 18a) The opinion shows appropriate deference to the Executive while maintaining the constitutional role of the Judiciary, including the protection of individual constitutional rights.

The Does do not dispute the right of the Executive to assert the state secrets privilege or the significant deference to which such an assertion would be entitled. The Does do dispute the existence of a wholly different rule that defines another land of governmental "say-so," *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2637 (2004) (citing district court), where absolute authority is demanded by the Executive based on nothing more than its assertion that a blanket rule of dismissal is necessary.

The Executive's position is that dismissal is required simply because a case touches on a covert relationship. It relies for its position on *Totten v. United States*, 92 U.S. (2 Otto) 105 (1875), which it contends deprives courts of subject matter jurisdiction whenever a case touches on a covert relationship related to espionage. The Ninth Circuit correctly rejected the Executive's proposed reading of *Totten*, and held that this case is governed by the state secrets privilege as set forth in *United States v. Reynolds*, 345 U.S. 1 (1953). Despite the Executive's protests that the state secrets privilege is inadequate to protect national security and that compliance with the privilege would improperly interfere with the DCI's other duties, there is not a shred of support in the record for these propositions.

Reynolds, the landmark state secrets case, decided at the height of the Cold War at a time of grave national peril, established a framework designed to protect state secrets while at the same time ensuring that claims of privilege are not invoked lightly or for illegitimate reasons. The state secrets privilege and the framework of *Reynolds* have for over half a century protected the Nation's secrets while preserving the constitutional role of the courts, and the

Executive does not contend otherwise. Nor does it contend that a covert relationship is not a type of state secret.

Reynolds recognizes that there may be instances where it is so obvious to the court that a case cannot proceed without disclosing state secrets that the privilege may be upheld on the pleadings. 345 U.S. at 11 n.26. Nowhere, however, does *Reynolds*, or any decision of this Court, including *Totten*, authorize the Executive to force dismissal of a case based on nothing more than its conclusory assertion that dismissal is necessary. Regardless of where a case falls on the continuum, *Reynolds* makes clear that it is a *judicial* function to determine whether a given case may proceed without public revelation of state secrets. The Judiciary must give appropriate deference to the Executive in making this determination, but it cannot abdicate this responsibility to the Executive. Here, both the Ninth Circuit and the district court concluded that disclosure of state secrets was *not* inevitable.

The Executive goes to great lengths to demonstrate the importance of human intelligence and the confidentiality these activities must be accorded. These propositions are not in dispute. The Does readily admit the importance of these activities, whether they are called spying, covert intelligence activities or human intelligence, and the need for secrecy. What the Executive fails to do is to demonstrate that these intelligence activities are any more secret or sensitive or are any more deserving of a special jurisdictional rule than any other types of espionage or state secrets, or that the state secrets privilege is insufficient to protect national security in this case.

The Executive's position in this case is particularly untenable because the Does assert constitutional claims. The Court has noted the "'serious constitutional question'" that would arise from the denial of "any judicial forum for a colorable constitutional claim" in *Webster v. Doe*, 486 U.S. 592, 603 (1988). The Executive offers no viable basis to distinguish *Webster*.

The Executive contends that dismissal of the Does' claims would present no constitutional difficulty because the case would have to be dismissed in any event if the Executive asserted the state secrets privilege and the court sustained it.

(Pet. Br. at 41)[7] This argument unjustifiably assumes the conclusion and is disrespectful of the courts' role in such matters. There is a world of difference between dismissal of a cause of action based on a careful evaluation by a neutral and independent Judiciary that has considered whether less draconian measures are available and a blanket rule that divests citizens of constitutional rights by Executive fiat.

The Executive's position is also unnecessarily broad. The Executive itself admits that not all cases against the Agency require the revelation of state secrets. The Executive has conceded that when plaintiffs proceed as "Does," certain aspects of their activities can be discussed without necessarily compromising national security (Pet. for Writ at 14 n.4)[8] Moreover, the Agency's own witness testified that proceedings involving the Agency and classified information occur routinely in courts. (R.App. 68-71)

The Executive attempts in this case to eliminate the Judiciary's vital constitutional role. The Executive's view that it can dictate whether a case may or may not go forward is an extreme position and a departure from long-accepted principles of separation of powers. History has demonstrated that courts are not institutionally incapable of dealing with cases touching upon national security. Acceptance of the Executive's position would set a course toward the complete erosion of *Reynolds* and a perilous concentration of power in the Executive. Such a departure from established law is not justified by this case.

III. ARGUMENT

A. The Executive Mischaracterizes This Case

The Executive attempts to force this case within its conception of *Totten* by repeatedly suggesting that the Does seek "to enforce the terms of an alleged agreement to perform espionage services" (Pet. Br. at 4), and that this case seeks "redress for the CIA's alleged wrongful refusal to compensate a spy." (Pet. Br. at 17) This is incorrect, as the district court and Ninth Circuit noted. (App. 11a-17a, 105a)

---

[7] "Pet. Br." refers to the Brief for the Petitioners.

[8] Pet. for Writ" refers to the Petition for a Writ of Certiorari.

The Does do not seek to enforce a contract, but rather to compel the CIA to provide a procedurally fair internal agency hearing for their claims for assistance and personal security, and a declaration that the CIA is required to comply with substantive law in dealing with their claims. (App. 117a-142a) The Does' claims are based on constitutional rights, not on contract. Their request does include financial assistance to cover basic human necessities including minimal shelter and sustenance, but it is also about health care, personal security and assistance in finding a job. The Executive's characterization of the Does' claims as seeking financial "compensation" for their espionage activities on behalf of the United States (Pet. Br. at 17) is not remotely fair or accurate. A reading of the complaint and a review of the CIA regulations governing the PL-110 program make plain that the Executive's characterization of this case is disingenuous.

The Executive incorrectly maintains that judicial consideration of the Does' claims would interfere with the Executive's conduct of international affairs. The Executive further mischaracterizes this case as threatening to interfere with the recruitment, compensation or termination of spies. (Pet. Br. at 22) This case does not concern the Executive's formulation or execution of foreign policy, nor does it involve the details of espionage. This case concerns whether a United States agency is required to comply with United States law in addressing the claims of United States citizens, and whether the Executive has authority to preclude the Judiciary from even deferential consideration of whether the Does' claims may proceed without disclosure of state secrets.

Nor does this case present a nonjusticiable "political question," as the Executive obliquely contends. Without engaging in the requisite analysis of the political question doctrine, the Executive cites *Baker v. Carr*, 369 U.S. 186, 211-17 (1962) (Pet. Br. at 21), apparently for the general proposition that principles of separation of powers preclude judicial review of matters that purport to touch upon national security or foreign affairs. This case does not present questions committed by the text of the Constitution exclusively to the Executive. The Executive cannot establish that it meets any other element of the requisite analysis. "[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."

Baker, 369 U.S. at 211; *see also Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986).

B. This Case Can Be Resolved Without Disclosure of State Secrets

The question whether this case can be resolved without disclosure of state secrets should, in the first instance, be directed to the district court. The district court in turn should be guided by the principles and adhere to the procedures of the state secrets privilege and its constitutional responsibility to explore whether there is a way for the Does' case to be resolved without disclosure of classified information. If the Executive ultimately asserts the state secrets privilege, the district court will treat the assertion with appropriate deference. (App. 39a) In addition, the district court can consider the record in this case in determining what nonsensitive information can be disentangled from sensitive information. The deposition transcript of CIA officer William McNair and the redacted PL-110 regulations voluntarily produced by the CIA (R.App. 41-50, 51-131) provide examples of nonsensitive disclosures that are possible.

The district court can also consider the Executive's admission that when a plaintiff proceeds using a pseudonym, disclosure of state secrets relating to a relationship with the CIA is not inevitable. (Pet. for Writ at 14 n.4) Further, the details of what process the Does were given and not given can hardly be claimed to be a state secret.[9] Moreover, the PL-110 materials belatedly disclosed by the Agency indicate that age, health and financial condition are relevant factors for the Agency to consider under the PL-110 program. (R.App. 44) The Does' age, health and financial condition are obviously not classified. Finally, the district court can consider whether it is appropriate to conduct *in camera* or closed hearings or to employ other procedures available to it, if appropriate. (App. 23a-25a, 31a-33a, 93a)

---

[9] The district court noted that under the facts as alleged, the Does were afforded "very little process." (App. 109a)

C. The Executive's Proposed Reading of *Totten* Violates the Constitution and Principles of Separation of Powers

Much of the Executive's argument concerns the need for secrecy in foreign intelligence operations. With that part of the argument the Does do not take exception. The Does do take exception to the conclusion that protecting state secrets requires compromising the Judiciary's constitutional role.

The Executive argues that separation of powers principles bar judicial review of "certain matters," including this matter, that purport to touch upon "foreign affairs and national security" (Pet. Br. at 21), and that the Judiciary lacks the institutional competence to conduct such review without improperly intruding on judgments wholly entrusted to the Executive. (Pet. Br. at 23)

In advancing this position, the Executive seeks an unwarranted expansion and concentration of Executive power in a manner that severely compromises the Judiciary's own constitutional obligations. The Executive seeks to circumvent the obligations of the state secrets privilege, a privilege based on critical separation of powers principles and the history of which amply demonstrates the courts' extensive experience and high degree of competence in fulfilling their requisite function in a manner that does not harm the Nation's security.

The role of a co-equal, independent and impartial Judiciary in safeguarding the rule of law in our democracy is axiomatic. The Executive's contention that the courthouse door must remain forever closed even to the most deferential judicial review runs afoul of the fundamental precept of the availability of the courts to enforce the rule of law and ensure procedural fairness when official conduct deprives citizens of liberty or property.

The need to protect secrets on matters pertaining to national security is beyond dispute, but so is the importance of checks and balances in our system of democracy. *See United States v. Nixon*, 418 U.S. 683, 704-05 (1974) (rejecting claim that separation of powers doctrine precludes judicial review of the Executive's claim of privilege, and reaffirming that "it is the province and duty of this Court 'to say what the law is'") (citing U.S. CONST. art III, § 1; *The*

Federalist No. 47, at 313 (James Madison); and quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

While the Executive articulates important interests, those interests do not justify compromising Judicial responsibility based on nothing more than the Executive's unilateral, untested assertion that it is inevitable that state secrets will be revealed. Here, competing interests include the determination of the appropriate process that is due where the constitutional rights of individuals are at issue, and what procedures are necessary to ensure that a citizen is not deprived of life, liberty or property without due process of law in accordance with the Fifth Amendment of the United States Constitution. *See Hamdi*, 124 S. Ct. at 2646. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury*, 5 U.S. at 163.

This Court has recognized, in evaluating the actions of Congress pursuant to that branch's own constitutional authority:

> It is fundamental that the great powers of Congress to conduct war and to regulate the Nation's foreign relations are subject to the constitutional requirements of due process. The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental action. "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." *Ex parte Milligan*, (US) 4 Wall, 2, 120-121, 18 L. Ed. 281.

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 164-65 (1963) (footnote omitted); *see also United States v. Robel*, 389 U.S. 258, 263 (1967) ("[T]he phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit.").

The same analysis applies to the Executive's constitutional powers and was recently reaffirmed by the Court in the context of Executive action in *Hamdi*:

> [W]e necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forego any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers as this approach serves only to *condense* power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952). . . .

124 S. Ct. at 2650.

While highly sensitive to the obligations of the Executive, the Court nonetheless rejected the view that such obligations deprive the Judiciary of its constitutional responsibilities, stating:

> Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake. *Mistretta v. United States*, 488 U.S. 361, 380 . . . (1989) (it was "the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty"); *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 426 . . . (1934) (The war power "is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties"). . . . Thus, while we do not question that our due process assessment must pay keen attention to the particular burdens faced by the Executive in the context of military action, it would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his government, simply because the Executive opposes making available such a challenge.

Id.

The Executive also objects to complying with the state secrets privilege because absolute authority is more convenient and would better "preserve[] the CIA's resources." (Pet. Br. at 33) This argument is insufficient to justify abdication of the Judiciary's role, including its responsibility to protect individual constitutional rights. Inconvenience is not a valid basis for deprivation of due process.

Our democracy is not the most efficient form of government, and for good reason. As this Court has noted, "[T]he doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power." *Myers v. United*

States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting). Indeed, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." *The Federalist No. 47* (James Madison).[10]

In articulating the importance of compliance with the state secrets privilege in this case, the Ninth Circuit noted:

> We acknowledge at the outset that it could very well turn out, after [invocation of the state secrets privilege and] further district court proceedings, that the Does will still be left without redress even if everything they allege is true. When the government asserts that the interests of individuals otherwise subject to legal redress must give way to national security interests for the larger public good, the result can end in a balance tipped toward the greater good, with resulting unfairness to the individual litigants as the acknowledged corollary.
>
> But precisely because the net result of refusing to adjudicate the Does' claims is to sacrifice their asserted

[10] *Cheney v. United States Dist. Court for Dist. of Columbia*, 124 S. Ct. 2576 (2004), cited by the Executive (Pet. Br. at 34), does not support its separation of powers argument. While reiterating that the President is not above the law, *Cheney* held that separation of powers principles could be considered by the court on remand in evaluating a mandamus petition seeking to modify or dissolve orders directed to the President or Vice President, recognizing the unique position of the Office of the President. Cognizant of the very broad discovery sought by plaintiffs, the Court found that on the facts of the case presented, "the only consequence from respondents' inability to obtain the discovery they seek is that it would be more difficult for private complainants to vindicate Congress' policy objectives under FACA [the Federal Advisory Committee Act]." *Id.* at 2589. In sharp contrast, accepting the Executive's separation of powers arguments here would impair the ability of the courts to perform their Article III function.

> constitutional interests to the security of the nation as a whole, both the government and the courts need to consider discretely, rather than by formula, whether this is a case in which there is simply no acceptable alternative to that sacrifice. The law regarding protection of national security interests in judicial proceedings provides guidance toward that end. States secrets privilege law prescribes that courts must be sure that claims of paramount national security interest are presented in the manner [to] best . . . assure their validity and must consider whether there are alternatives to outright dismissal that could provide whatever assurances of secrecy are necessary. That counterweight role has been reserved for the judiciary. We must fulfill it with precision and care, lest we encourage both executive overreaching and a corrosive appearance of inequitable treatment of those who have undertaken great risks to help our nation, an appearance that could itself have long-run national security implications.
>
> * * * *
>
> . . . Determining when we must ask individuals to bear the brunt of our national interest is a matter of profound moral importance. We therefore require that the government address the question in a manner commensurate with it its gravity.

(App. 18a-19a, 30a (citations omitted))

While substantial deference is due the Executive in national security matters, such deference is not unlimited and cannot run roughshod over the Executive's obligation to comply with the law of the land and respect this Court's own

constitutional obligations. *See* U.S. CONST., art. II, § 3 (charging the President to "take Care that the Laws be faithfully executed"); U.S. CONST. art. II, § 1, cl. 8 (constitutionally prescribed oath of office requires that President undertake to "preserve, protect and defend the Constitution of the United States").[11] Even in the conduct of sensitive and important matters, the scope of the Executive's power is not unlimited.

D. Dismissal of This Case on Jurisdictional Grounds Is Incompatible With the Principles Embodied in the State Secrets Privilege

The Executive seeks to avoid the requirements of the state secrets privilege by characterizing *Totten* as a jurisdictional or "categorical" bar. The Executive's basic premise is that courts cannot be trusted and are incompetent to deal with issues that touch upon national security and that the CIA should not be "inconvenienced" by the requirements of the state secrets privilege. (Pet. Br. at 23, 33)

The Ninth Circuit correctly rejected the Executive's position. The state secrets privilege and the framework set forth in *Reynolds* have for over half a century protected the Nation's secrets while preserving the constitutional role of the Judiciary. The Executive offers no evidence to the contrary, only conjecture.

---

[11] *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), does not support the Executive's arguments to the contrary. *Curtiss-Wright* affirmed the fundamental principle that "every . . . governmental power . . . must be exercised in subordination to the applicable provisions of the Constitution." *Id.* at 320; *see also Home Bldg & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934) ("[E]ven the war power does not remove constitutional limitations safeguarding essential liberties."); *United States v. Robel*, 389 U.S. 258, 264 (1967) ("Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart."). Unlike *Curtiss-Wright*, this case is not about the conduct of international relations with foreign nations, but rather the constitutional claims of United States citizens. *See also Myers*, 272 U.S. at 292 (Brandeis, J., dissenting) ("Checks and balances were established in order that this should be 'a government of laws and not of men.'").

Reynolds was decided at the height of the Cold War, and its framework is designed to accommodate the exigencies of national security even under conditions of war or grave concern about national security. *See* 345 U.S. at 10.[12] *Reynolds* balances two competing concerns: the protection of state secrets and the Judiciary's responsibility to protect the rights of individual litigants and to prevent Executive abuse. *Id.* at 8.

Reynolds accommodates these concerns by establishing a procedure to ensure that the privilege is not invoked lightly or for improper reasons. *Id.* at 7-8. Specifically, it requires the head of the department with control over the matter to formally assert the privilege after personal consideration. *Id.* at 8. At the same time, the opinion makes clear that in asserting the privilege, the Executive need not detail the secret information it seeks to protect; the Executive need go no further than to provide an explanation sufficient to persuade the court that state secrets are legitimately at risk. *Id.* at 8, 10. The *Reynolds* Court noted, citing *Totten*, that there may be instances where it is so obvious to the court that a case cannot proceed without disclosing state secrets that the privilege may be upheld on the pleadings—but only where the *court* itself is satisfied that state secrets will be revealed if the case goes forward. *Id.* at 11 n.26.

The Executive turns this discussion on its head by treating it as license for the Executive to force dismissal of a case even where, as here, the trial court is *not* persuaded that state secrets will be revealed. This reading is fundamentally incompatible with *Reynolds'* repeated admonition that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *Id.* at 9-10. *See also id.* at 8 ("The court itself must determine whether

---

[12] Between 1950 and 1953, the Soviet Union had shot down no less than five United States military reconnaissance aircraft, and Strategic Air Command aircraft were conducting reconnaissance missions against the Soviet Union while the nation rushed to expand and deploy its nuclear-capable forces. *See generally* Symposium at Strategic Air Command Museum, *Cold War in Flames: The Untold Story of Airborne Reconnaissance* (Sept. 12, 1998); presentation by Greg Skavinski, *Secrets of the Cold War*, U.S. News & World Rep. (Mar. 15, 1993); Kohn & Harafan, *Strategic Air Warfare* (Office of Air Force History) United States Air Force (1988), pp. 90-119.

the circumstances are appropriate for the claim of privilege . . . ."); *id.* at 8 n.21 ("'It is the judge who is in control of the trial, not the executive.'") (citation omitted). Consistent with these principles, the Ninth Circuit concluded that the deference due to an Executive claim of privilege, given the facts of this case, "does not entirely obviate the CIA's need to make a minimally coherent explanation to the court concerning why simply admitting to a relationship with the Does could conceivably jeopardize national security." (App. 36a-37a)

Because assertion of the privilege is accorded substantial deference and because the privilege can operate to deny even valid claims a forum, insistence on the limited requirements of the state secrets privilege is important, particularly where the Does assert colorable constitutional claims. It is also critical that the court have an opportunity to examine alternative procedures, such as *in camera* submittals, should they become relevant to evaluating whether the case can proceed without disclosure of state secrets.

As the Ninth Circuit observed, the procedure may be considered a formality, but "formalities often matter a great deal, and they certainly matter here." (App. 29a) The burden imposed on the Executive is, moreover, modest, particularly when compared to the burden imposed on a litigant, who may be left without a remedy for a valid claim if the privilege is upheld, as the Ninth Circuit recognized. (App. 18a-19a)

E. This Court and Circuit Courts Have Not Treated *Totten* as a Jurisdictional Bar

The Ninth Circuit correctly concluded that *Totten* is an early expression of the evidentiary state secrets privilege, not a jurisdictional bar to the Does' claims. (App. 25a) More than a century of legal development indicates that the policies discussed in *Totten* have been incorporated into the privilege and are subject to the procedures under which the privilege is now governed.

Reynolds treats *Totten* as a privilege rather than a jurisdictional bar. Explaining the history of the state secrets privilege, the Court noted that the "privilege against revealing military secrets . . . is well established in the law of evidence," citing a line of cases, first among which is *Totten*. 345 U.S. at 6-7. *See also id.* at 11 n.26 (citing *Totten* for the

proposition that "the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of *privilege* if the court is ultimately satisfied that military secrets are at stake") (emphasis added); *Rubin v. United States ex rel. Indep. Counsel*, 119 S. Ct. 461, 462 (1998) (dissent from denial of certiorari, discussing ability of courts to recognize "new privileges," citing *Totten* as example for "state secrets privilege" (Breyer, J., dissenting)).

The Executive itself characterized *Totten* in its *Webster* briefing to this Court as an early state secrets privilege case, not a jurisdictional bar as it does here.[13]

A number of circuit courts likewise have treated *Totten* as a state secrets privilege case. *Zweibon v. Mitchell*, 516 F.2d 594, 625 & n.80 (D.C. Cir. 1975) (*en banc*) (describing *Totten* as "foreshadow[ing]" the "*evidentiary* privilege of the Executive Branch with respect to production of documents whose publication could endanger military or diplomatic secrets"); *In re Sealed Case*, 121 F.3d 729, 736 (D.C. Cir. 1997) (*en banc*) (discussing history of Executive privilege, citing *Totten* as "early" ruling that Executive may withhold state secrets); *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 548 (2d Cir. 1991) (citing *Totten* in the context of the state secrets privilege).

The Executive fails to cite one case holding that the Executive has exclusive and absolute authority to cause the dismissal of a case by declaring unilaterally that it is "inevitable" that state secrets will be disclosed if a case goes forward. *Guong v. United States*, 860 F.2d 1063 (Fed. Cir. 1988), on which the Executive relies, does not stand for this

---

[13] In briefing submitted to the Court in *Webster v. Doe*, 486 U.S. 592 (1988), the Executive explained that:

> [t]he military and state secrets privilege was generally established before Congress adopted the National Security Act of 1947 and the CIA Act of 1949. *Totten*; see *Reynolds*, 345 U.S. at 6-8 (discussing the origins of the **privilege**). **If these privileges were sufficient**, it would have been unnecessary to enact Section 102(c).

Brief of Petitioner at 39 n.34 (emphasis added) (No. 86-1294).

proposition. In *Guong*, the *court* determined that the case could not proceed without disclosing classified information, although it did so without insisting on the formalities of the state secrets privilege, because in the *court's* view, formal assertion of the privilege would not alter its conclusion. This is consistent with footnote 26 in *Reynolds*. *Id.*

Guong did not involve constitutional claims. The plaintiff in *Guong* sought explicitly to enforce a secret contract, and the complaint divulged the terms of that contract, as well as the details of the alleged classified espionage activities. The plaintiff in *Guong* sought to litigate the details of his claim in district court, unlike the Does here, and revealed the names of individuals involved. It was in that context that the *court* concluded the case could not proceed without the classified information. Thus, even if *Guong* stood for the proposition that it is the Executive who decides whether a case can proceed without disclosure of state secrets, and it does not, it is not remotely analogous to this case, where the Does do not seek to enforce a secret contract, where their complaint alleges no classified facts, and where they seek an internal agency forum for their substantive claims.

The Executive's misreading of *Guong* as jurisdictional is confirmed by a later case from the same circuit, *Air-Sea Forwarders, Inc. v. United States*, 166 F.3d 1170 (Fed. Cir. 1999). There, the Federal Circuit expressly declined to affirm the lower court's dismissal of a breach of contract claim against the CIA as barred by *Totten*, instead affirming on the ground that the claim was barred by a prior settlement. *Id.* at 1172. By reaching the merits of the contract issue, the *Air-Sea* court made clear that it did not consider *Totten* jurisdictional. *See also McDonnell Douglas Corp. v. United States*, 323 F.3d 1006, 1021 (Fed. Cir. 2003) (discussing *Totten* in context of the state secrets privilege).

In *Monarch Assurance P.L.C. v. United States*, 244 F.3d 1356 (Fed. Cir. 2001), the Federal Circuit again rejected the Executive's attempt to transform *Totten* into a jurisdictional bar. In that case, the Executive moved to dismiss on the ground that *Totten* barred a suit alleging a breach of contract involving secret CIA actions. *Id.* at 1358 The trial court denied the motion and the Federal Circuit affirmed, citing with approval the trial court's reasoning that the plaintiff

should be given the opportunity to make a case without the privileged information. *Id.* at 1360.

The Executive's reliance on *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 149 (1981), is misplaced. The case was decided on the ground that Congress had determined statutorily what information could be released, not by application of *Totten*. The passing citation to *Totten* was not the basis of the decision but rather, as the Ninth Circuit noted, an explanation by way of analogy about why the inquiry could not go forward in the court. (App. 28a-29a)

Circuit courts around the Nation have refused to accept the Executive's effort to transform *Totten* into a separate "doctrine" of jurisdiction. *See, e.g., Clift v. United States*, 597 F.2d 826 (2d Cir. 1979) (rejecting the Executive's *Totten* argument, concluding that the district court "acted too precipitately in dismissing the complaint," *id.* at 827, and holding that the plaintiff should have an opportunity to pursue the case without the secret evidence, *id.* at 830); *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268 (4th Cir. 1980) (*en banc*) (rejecting *Totten* argument and affirming dismissal only after reviewing classified affidavit submitted in support of the assertion of the state secrets privilege); *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1244 (4th Cir. 1985) (affirming dismissal only after review of classified declaration filed in support of the privilege).

F. *Totten* Does Not Support the Executive's Extreme Position

Even if the Court were to put aside the legal developments of the last century and a quarter and treat *Totten* as an independent basis for dismissal, rather than as part of the state secrets privilege, the case would not support dismissal of the Does' case on jurisdictional grounds.

In *Totten*, the plaintiff sought to enforce a contract for espionage services, and the complaint disclosed the identity of the alleged spy and the details of his covert mission. *See Totten*, 92 U.S. at 105-06. The Court dismissed the action on the ground that the public disclosures in the complaint breached the alleged contract and thus prevented its enforcement. By contrast, the Does bring an action for violation of their constitutional rights. Their complaint does

not disclose classified information, does not seek enforcement of a contract and does not seek adjudication of their substantive claims in court, but rather within the Agency. It is indeed far from self-evident that the *Totten* Court would have dismissed a case like the Does—in which the complaint seeks a secure nonpublic forum in which to have their claims fairly considered, does not reveal state secrets and does not seek to enforce a secret contract.

The Executive insists that *Totten* stands for the more general principle that "public policy forbids the maintenance of any suit in a court of justice, the trial of which would *inevitably* lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated." (Pet. Br. at 11 (quoting *Totten*, 92 U.S. at 107) (emphasis added))

In *Totten*, the Court decided that the case could not go forward. Whatever can be said of *Totten*, it assuredly does not stand for the proposition that the Executive can deprive a court of subject matter jurisdiction based on nothing more than its naked assertion that this is necessary, when the court itself is unpersuaded that state secrets are at issue. Not only is *Totten* by its own terms limited to cases in which the court considers disclosure of state secrets to be inevitable, the case does not even purport to address what procedures are appropriate when colorable constitutional claims are asserted.

While it is the prerogative of the Executive to assert the state secrets privilege, it is the responsibility of the Judiciary to make the determination whether the case can proceed. The district court here found that, on the existing record, it was not inevitable that state secrets would be disclosed. (App. 106a-107a) Perhaps that decision will change if the Executive asserts the privilege. This Court should not remove that function from the district court.

G. The State Secrets Privilege Is Fully Adequate to Accommodate the Executive's Concerns, and the Executive Fails to Show Otherwise

The Executive opposes an individualized evaluation of the risks of disclosure on a case-by-case basis in favor of an automatic rule of dismissal, regardless of whether a case

could, in fact, proceed without the disclosure of state secrets. A similar paradigm was recently rejected by this Court:

> [T]he position that the courts must forego any examination of the individual case and focus exclusively on the legality of the broader . . . scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to condense power into a single branch of government.

Hamdi, 124 S. Ct. at 2650 (emphasis omitted).

Although the Executive purports to confine its rule of judicial exclusion to cases touching on "espionage relationships," it has demanded deference on the basis of national security in cases spanning from the military use of dolphins, *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236 (4th Cir. 1985), to nuclear weapons storage, *Weinberger v. Catholic Action of Haw./Peace Educ. Project* 454 U.S. 139 (1981), to the presence of hazardous waste at a secret air base, *Kasza v. Browner*, 133 F.3d 1159 (9th Cir. 1998).

The Executive itself hints at the potential breadth of the rule it proposes when it suggests that "[o]n a practical level, *Totten* also serves the national security mission of the CIA *and other intelligence agencies*" (Pet. Br. at 33) (emphasis added), and that *Totten* is not confined to contract claims and should operate as a jurisdictional bar whenever the Executive believes the "secret nature of the underlying relationship" is implicated. (Pet. Br. at 26) The Executive advocates a slippery slope indeed and a substantially diminished role for the Judiciary resulting in the concentration of power in the Executive Branch.[14]

---

[14] Further, a secret or espionage relationship could be asserted to exist in a broad range of Executive interactions. How would the Executive's proposed rule of judicial exclusion apply to an "espionage relationship" that was really more coercive—perhaps more akin to detention? How would it apply if the secret relationship is a result of governmental duress, or if the secret being kept is governmental misconduct? Under the Executive's approach, the judiciary would be precluded even from deferential and nonpublic consideration of whether a case could proceed, based on nothing more than the statement of a mid-

The Executive justifies this momentous departure from traditional constitutional principles because it would better serve the "CIA's interests" and because such a rule avoids inconvenience and "greatly preserve[s] the CIA's resources."[15] (Pet. Br. at 32-34) Not surprisingly, the Executive does not cite one case that inconvenience or "resources" can trump the constitutional obligation of the Judiciary. Such arguments are in any event immaterial to jurisdiction.

Perhaps to blunt the constitutional difficulties in its position, the Executive asserts that the Does are not without "remedies." (Pet. Br. at 21) The Executive's representation to this Court about the availability of recourse to the CIA's Inspector General is not supported by the record and, in this case at least, is misleading.[16] The Executive made the same argument in its Petition. (Pet. for Writ at 12) After the Petition was filed, the Does reminded the Executive that the Does had requested IG review of their case but no review had occurred. The Does asked the Executive to withdraw the argument. The request was ignored, and the Executive reiterates the same argument in its latest brief.

The Executive also assures this Court that spies can protect their own interests by "seek[ing] certain assurances about the extent to which the Agency will provide a fair process to review any dispute." (Pet. Br. at 29) As a practical matter, the notion that the Does could have protected themselves by requesting "certain assurances"—precisely what they did—makes no sense given the Executive's

level official from an intelligence agency that the case involved an espionage or secret relationship.

[15] Putting aside the limited nature of the *Reynolds* requirements, particularly when contrasted to the potential loss of a remedy when the privilege is sustained, the Executive fails to offer any support for the notion that asserting the privilege would be burdensome in this case and only speculation that it would be burdensome in others.

[16] At the time the Does filed their appeal to the DCI in late 1997, they also requested an independent review by the Agency's Inspector General. (App. 130a-131a; R.App. 20) An IG review did not occur. A subsequent request by the Does for IG review was not responded to. To the Does' knowledge, their requests did not result in any review by the IG. Nor has the Executive ever asserted that such a review occurred. (*Id.*)

position that the Does are outside the law and that any assurances therefore are meaningless.[17]

The Executive also repeatedly and erroneously insists that requiring compliance with the state secrets privilege will force the Executive to disclose the "details" of the Does' relationship to the Executive. (Pet. Br. at 9, 22, 24-25, 40) This is a red herring. The state secrets privilege is designed precisely to prevent disclosures that harm the national interest. *Reynolds* is explicit in this regard. It makes clear that the Executive need not divulge the details of the matter at hand to invoke the privilege. Rather, the Executive need only provide the district court a sufficient explanation to allow the court to conclude that the privilege is asserted for a legitimate purpose and that state secrets are at risk. *Reynolds*, 345 U.S. at 9-10 (explaining that complete disclosure is not required to invoke the privilege). Perhaps it is the fear that it could not sustain this minimal burden in this case that causes the Executive to take such an extreme position.

In this case, the Ninth Circuit clearly did not contemplate that assertion of the privilege would require any detailed revelations by the Executive. The Court of Appeals only noted that the Executive could not avoid a "minimally coherent explanation to the court" as to how simply admitting a relationship with the unnamed Does in this case, given the absence of classified or even identifying information in the complaint or other filings, could "conceivably jeopardize national security." (App. 36a-37a) Moreover, in asserting the privilege the Executive can make use of a full panoply of protective measures, including filing under seal, which can protect even the subject matter of the filing. Other measures are available as well, including redacted filings and *in*

[17] The Executive maintains that the Does are outside the law (Pet. Br. at 26) (arguing that the Does have no "recognized position" according to domestic law). The Executive does not have authority to declare United States citizens to be outside United States law. Not surprisingly, the Executive's contention on this point is wholly unsupported. The Executive relies on secondary sources that discuss the status of spies captured abroad (Pet. Br. at 26) (citing L. Oppenheim, *International Law –A Treatise* 862 (8th ed. 1955)), a circumstance not remotely analogous to the situation of the Does, who are United States citizens residing in the United States.

camera review,[18] as the Ninth Circuit noted. The availability of these measures refutes the Executive's contention that the very assertion of the privilege compromises national security and that "the mere explanation of why information must be withheld can convey valuable information to a foreign intelligence agency." (Pet. Br. at 35-36)

The Executive erroneously equates assertion of the state secrets privilege with *public* disclosure. The state secrets privilege does not require public disclosure. The Executive's reliance on *CIA v. Sims*, 471 U.S. 159 (1985), which dealt with disclosure of classified information to the *public* under the Freedom of Information Act, is therefore inapposite. The Executive cites *Sims*, 471 U.S. at 176, for the proposition that "forced disclosure of the identities of [the CIA's] intelligence sources" would be harmful to national security. (Pet. Br. at 16) The Does do not contest this, as already noted. The issue presented in this case is not the forced public disclosure of classified information, but rather the limited requirement that the Executive provide the district court some support for its contention that state secrets will be revealed if this case goes forward—an assertion that can be made in a sealed filing or *in camera* to the court, and one the Ninth Circuit recognized would be entitled to great deference. (App. 36a) Similarly, the Does do not propose, nor do they wish, to disclose classified information in "open court," as the Executive implies. (Pet. Br. at 4)[19]

---

[18] *See, e.g., Kerr v. United States District Court for N. Dist. of Calif.*, 426 U.S. 394, 405-06 (1976) (citing, *e.g., Nixon*, 418 U.S. at 706; *United States v. Reynolds*, 345 U.S. 1 (1953)). *See also Webster*, 486 U.S. at 604 (citing *Kerr* and *Reynolds* with approval in the context of a case brought against the CIA by a covert CIA operative).

[19] The Executive's reliance on other FOIA cases, and other cases considering *public* disclosures of classified information, suffers from the same defect as its reliance on *Sims*. Moreover, such cases demonstrate the Executive's compliance with the requirements of judicial review in other cases, whether for FOIA exemptions or for the Executive's invocation of the state secrets privilege, including with respect to the CIA, and involving highly sensitive matters. For example, in *Military Audit Project v. Casey*, 656 F.2d 724, 745 (D.C. Cir. 1981), a case involving the CIA's alleged involvement with Hughes' *Glomar Explorer* expedition, the court carefully considered whether the Agency had established that the information sought properly could be withheld under a statutory exemption, which review included *in camera* consideration of detailed affidavits from agency senior officials. Similarly, *Halkin v. Helms*, 598 F.2d 1, 8 (D.C. Cir. 1978), appeal after remand, 690 F.2d 977 (D.C. 1982) was decided only after the court evaluated the Executive's assertion of the state secrets privilege. These cases make clear that it is the *court* that must make the critical determination, not the Executive on its untested, unilateral assertion.

The Executive also attempts to justify a jurisdictional bar on the ground that it is necessary to prevent a judicial forum for "graymail." (Pet. Br. at 33-34) This argument is weak to say the least. The Executive extols the "benefits to the CIA" of a rule that denies access to the courts by "individuals who have *real* or perceived grievances." (Pet. Br. at 33) (emphasis added) But a disaffected individual is not limited to a judicial proceeding to engage in such conduct. Indeed, the federal courts would hardly seem the most advantageous forum in which to threaten the United States government. Given the multiple alternative channels for disclosure of state secrets—including the news media, publishing houses, the Internet, even enemies of the State—it defies reason to suggest that precluding jurisdiction is an antidote to graymail.

In support of its graymail argument, the Executive contends that it is not the disclosure of state secrets in a complaint (which a jurisdictional bar would not prevent) that endangers national security, but rather assertion of the privilege that does so. This notion also defies common sense and the long history of the privilege.

The assumption that *Totten* must be read as an absolute bar to prevent the disclosure of state secrets also ignores existing constraints on the revelation of such information, including criminal sanctions. *See* 18 U.S.C. §§ 793-794 (criminalizing such disclosure). In addition, individuals in covert relationships typically fear for their lives and do not want their identities made public, as is the case of the Does who live under assumed identities. Finally, as already discussed, courts are required to treat assertion of the privilege with appropriate deference and have established procedures for sealed filings, and *in camera* or ex parte submissions and proceedings. These constraints, not a jurisdictional bar, have long served to prevent disclosure of classified or other sensitive national security information in the courts.

H. The Court's Decision in *Webster* Refutes the Executive's Premise That the Judiciary Cannot Perform Its Constitutional Function in Cases Involving the CIA and Its Covert Intelligence Activities

The Court's decision in *Webster v. Doe*, 486 U.S. 592 (1988), refutes the Executive's contention that there is an exception to the state secrets privilege for claims touching upon an espionage relationship. (Pet. Br. at 8, 22) *Webster* involved constitutional claims by a former CIA covert electronics technician for alleged discrimination based on sexual orientation. Although the Court held that pursuant to statutory authority the DCI had absolute discretion to terminate an employee and that such decisions were not reviewable under the Administrative Procedure Act, 5 U.S.C. § 701(a)(2), 486 U.S. at 599-602, the Court also held that a person who had a secret relationship with the CIA and presented colorable constitutional claims could go forward and litigate them.

In *Webster*, the Court rejected the CIA's argument that the plaintiff's constitutional claims were nonreviewable, noting the "'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Id.* at 603 (citing *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)). In so ruling, the Court noted that "the District Court has the latitude to control any discovery process which may be instituted so as to balance respondent's need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission." *Id.* at 604.[20]

The Does' case is stronger than the plaintiff's case in *Webster*. In *Webster*, the plaintiff sought an adjudication of his substantive claim in the federal district court. By contrast here, the Does request that substantive consideration of their claims for assistance and personal security occur in an *internal* Agency forum, and that the internal hearing comply

[20] The record here does not contain a single assertion by the CIA that the *Webster* proceedings resulted in any disclosure of secrets or any other problem, except perhaps the CIA's alleged inconvenience.

with due process and apply substantive law. In addition, *Webster* included the issue of whether Congress had precluded judicial consideration of the claim asserted. *Id.* at 606 (O'Connor, J. dissenting). Here, there is no such congressional action. Rather, the issue is whether the Executive has the authority unilaterally to preclude even deferential judicial consideration of whether a case may proceed without disclosure of state secrets.

The Executive has conceded in its failed attempt to distinguish *Webster* that "[a]s long as a covert CIA employee's name is not identified, certain aspects of his or her activities . . . can be revealed or litigated without necessarily exposing classified information." (Pet. for Writ at 14 n.4) The same is true here. The Does have proceeded, like the plaintiff in *Webster*, using pseudonyms. The key issues of the Does' age, health and financial need can be revealed without exposing classified information.

The Executive attempts to distinguish *Webster* from this case on the ground that the plaintiff in *Webster* was a covert CIA employee, which it contends is "meaningfully different" from a non-employee espionage agent, as far as security implications and historical treatment. (Pet. Br. at 39-40) This distinction lacks merit, reason, and record support. A more appropriate distinction would be between a person acting for the CIA in a covert capacity and a person openly acting for the CIA (of which there are many).

The Executive's inference that the *Webster* plaintiff's relationship with the CIA or his work on behalf of the CIA was any less secret or sensitive than the Does is not supported by the record. The fact that the employee in *Webster* was covert[21] presumptively indicates that he was engaged in covert activities abroad, consistent with the CIA's foreign intelligence mission.[22] Whether the Doe in *Webster*

[21] Covert is synonymous with secret and a covert agent or employee is presumptively no different than a "spy." They both have a secret relationship with the CIA and undertake secret missions. *Guong*, 860 F.2d at 1065 ("secret and covert are synonymous").

[22] The Ninth Circuit posited that the "only obvious differences between *Webster* and this case for present purposes is that the Doe in the *Webster* case was a domestic employee while the Does in this case are foreigners who were engaged to spy for the United States abroad." (App. 34a) However, the *Webster* opinion does not state that the plaintiff

worked domestically or overseas, the fact that he was a covert employee puts him in the same category as the Does—persons carrying out secret duties for the CIA undercover.

In addition to the lack of record support or logic for the Executive's attempt to distinguish *Webster* on the basis of employee or non-employee status, and the equal protection concerns such a distinction would raise, the Executive's own *Webster* briefing demonstrates that the distinction is meritless. In *Webster*, the Executive urged dismissal of the case on national security grounds and characterized *Totten* as a case involving "breach of an employment contract" concerning espionage activities.[23] This completely undermines the Executive's position here that whether a person is an employee or a non-employee is material in determining whether the case may go forward.

The Executive's attempts to distinguish *Webster* are meritless. *Webster* squarely supports the Does and the Executive fails to show otherwise.

I. The Record of the Executive's Conduct in This Case Cautions Against Granting the Executive the Absolute Authority It Demands.

The record of the Executive's conduct in this case demonstrates the dangers of acceding to the Executive's request for unreviewable authority. For example, the Executive initially denied in the district court—and denied categorically—the existence of any law or regulation that provided a basis for assistance to the Does. These representations were untrue, as made clear by the Executive's later admissions and by regulations subsequently produced by the Executive.

More particularly, in response to the Does' allegations regarding what they were repeatedly told by CIA officials over a period of years about the existence and requirements

in that case was a domestic employee. Nor does it refute the presumption that the *Webster* plaintiff was engaged in foreign espionage on behalf of the CIA.

[23] *Webster*, 486 U.S. at 592, Brief for Petitioner at 39 n.33 (No. 86-1294).

of the PL-110 program,[24] as well as plaintiffs' citation to testimony presented to the United States Congress about the PL-110 program, the Executive initially represented to the district court:

> [W]hat Plaintiffs refer to as "PL-110" does not in any way obligate the CIA . . . to furnish Plaintiffs life-long **financial or other assistance.**[25]
>
> What they [plaintiffs] refer to as "PL-110" is almost certainly 50 U.S.C. § 403h. That statute . . . merely provides for the admission of a limited number of aliens into the United States each year. . . . The statute is completely silent regarding any obligation, **financial or otherwise**, imposed on the government with respect to aliens admitted to the United States under its provisions.[26]
>
> . . . .
>
> Accordingly, to the extent the Plaintiffs have a protected property interest in the financial assistance they seek, **the only source of such arguable entitlement** must be their alleged oral/written agreements with the CIA . . . .[27]
>
> . . . .
>
> [P]laintiffs allege that one or more of their CIA contacts "continually assured" them that "the Agency's PL-110 program" guaranteed plaintiffs continued financial support . . . . Any

[24] *See* Second Amended Complaint, App. 117a-142a, ¶¶ 4.4, 4.12, 4.13, 4.16, 4.17; John Doe Decl., R.App. 1-17, ¶¶ 3-6, 10, 12, 17.

[25] Memorandum by defendants in support of Motion to Dismiss for lack of subject matter jurisdiction, or alternatively, for failure to state a claim at 8, Docket Number 5, United States District Court Docket Entries, J.App. 8 (emphasis added).

[26] *Id.* (emphasis added) (attaching a copy of 50 U.S.C. § 403h).

[27] *Id.* (emphasis added).

> such alleged assurance **amounts to nothing more than a part of the secret bargain** the CIA was allegedly attempting to strike with plaintiffs.[28]
>
> Plaintiffs' **sole basis** for their self-serving, extra-textual interpretation of PL-110 is a single sentence in the 1987 congressional testimony of William Geimer . . . . That testimony is inconsistent with the wording of the statute, does not purport to reflect CIA policy, and is in no way binding on the United States.[29]

These representations led the district court to observe in denying the first Executive motion to dismiss that "Defendants claim in their brief not to know what 'PL-110' refers to, but believe it is a reference to 50 U.S.C. § 403h which imposes no obligation of assistance on the government." (App. 98a n.3)

Having failed to obtain dismissal of the case, the Executive filed a "Motion for Summary Judgment or in the Alternative, Renewed Motion to Dismiss," in which it emphatically stated:

> The Federal Defendants wish to make the record crystal clear with respect to PL-110. As the attached McNair Declaration **unequivocally** states, there is **no** regulation (either internal or external), **no** statute, and **no** written or unwritten CIA policy or practice that entitles plaintiffs, or any alleged defector, to life-long financial benefits. . . . Nor did such a policy exist at the time plaintiffs allegedly defected, or in the interim period. . . . Because none exists, plaintiffs have not and will not cite any authority to the contrary to

[28]Reply by defendant to Response to Motion to Dismiss at 4, Docket Number 20, United States District Court Docket Entries, J.App. 12 (emphasis added).

[29] *Id.* at 4-5 (emphasis added).

> this Court. Accordingly, any suggestion plaintiffs' supposed entitlement to a property interest in life-long financial assistance derives from PL-110, or any implementing regulations promulgated thereunder, has no basis whatsoever in fact or in law.

Memorandum by defendants USA in support of Motion for Summary Judgment, or, in the alternative, Renewed Motion to Dismiss at 4-5, Docket Number 30, United States District Court Docket Entries, J.App. 14 (emphasis in original).

In support of its "renewed" motion to dismiss, the Executive submitted the McNair Declaration (App. 143a-148a), which in stark contrast to the Executive's earlier representations to the Court, admitted that 50 U.S.C. § 403h is "commonly known as 'PL-110'" (App. 144a) and that:

> [t]here is an agreement between the CIA and the Department of Justice in which CIA promised to DOJ that CIA would ensure that individuals whom the CIA brought into the United States under the authority of PL-110 would not become public charges before such time that they either attained United States citizenship, or were eligible to become United States citizens. **The Agency has a regulation to this effect as well.** [30]

After being served with a copy of the McNair Declaration, the Does sought production under Fed. R. Civ. P. 34 of the agreement referenced in the Declaration between DOJ and CIA covering PL-110 participants, and regulations

[30] McNair Decl., App. 145a ¶ 6 (emphasis added). The Does moved to strike portions of the McNair Declaration (R.App. 33-38) on four grounds, including that Mr. McNair was unable to identify in his deposition which portions of the declaration were based on his personal knowledge and which parts were language provided by attorneys (R.App. 34-35), and that the declaration constituted a legal opinion he was not competent to offer. (R.App. 36-37) The district court disregarded the legal conclusions. (App. 88a n.6) The Does object here on the same grounds as in their motion to strike in the district court.

governing PL-110 program participants. The Executive produced redacted versions of certain CIA regulations and related documents.[31] (R.App. 41-50) The following two redacted portions of these documents are particularly instructive, as they contradict the Executive's prior representations to the court:

> *Letter From CIA to DOJ, December 12, 1988*
>
> I am writing to request your assistance in revising certain understandings made in a 1949 letter to the Attorney General by then DCI Admiral Hillenkoetter concerning CIA commitments to those aliens permitted entry into the United States under the provisions of 50 U.S.C.A. 403h. . . .
>
> Certainly, the CIA believes it has an **obligation to support** each of its [redacted] for a reasonable period of time and, **in some cases, based upon unique circumstances such as illness, age, or indigency, this commitment may be for life.**
>
> *CIA Regulations, Section B, item c. (4)-(6) date: 06/23/81*
>
> As a general rule, CIA financial support for [redacted] should cease as soon as possible. . . . **CIA may continue to provide financial support** to [redacted] even after [redacted] has obtained citizenship or resided in the United States for 10 years, **if [redacted] determines that such support is necessary. The safety and security of [redacted] are continuing responsibilities of CIA**
>
> . . . .

(R.App. 43-44, 50 (emphasis added))

[31] Prior to this, the parties had agreed to refrain from discovery until the jurisdictional issue was resolved. However, once the Executive moved under Fed. R. Civ. P. 56 and offered what it maintained was "evidence," the Does were compelled to engage in limited discovery to support their response.

In denying the Executive's second motion, the district court noted:

> [i]n their first motion to dismiss, defendants claimed not to know what PL-110 was. Now, they acknowledge not only the existence of PL-110, but also the existence of CIA internal regulations concerning the PL-110 program and the financial benefits accorded to defectors. . . . Defendants' initial denial of knowledge of PL-110, followed by their subsequent acknowledgment of PL-110 and related regulations, weaken their credibility.

(App. 87a-88a) The record of the Executive's conduct in the district court with respect to PL-110 establishes that the Agency made material misrepresentations to the court.

Also illustrative of Agency conduct is the arbitrary "process" the Does received. Among other deficiencies, the Agency misrepresented to the Does' counsel the standard for requests by persons such as the Does for additional assistance from the Agency. The Agency misrepresentation that the standard is the "value of the services" performed rather than the correct standard of age, health and indigency totally compromised any chance the Does' appeal had of succeeding on the merits. The Agency also refused to provide pertinent PL-110 regulations, but later, for its own purposes, disclosed them openly in court. The Agency refused to provide regulations defining the appeal procedures and supplied inconsistent verbal advice.

In addition, the Agency's failure to respond to inquiries, its refusal to allow the Does or their counsel to attend the Does' hearing and its refusal to allow access to relevant materials, including the Does' counsel's own notes, together with other procedural defects, demonstrate the lack of any semblance of fair process. Further, the Executive's representation that redress for the Does is available through the Agency Inspector General (Pet. Br. at 21), when the

Executive lawyers were reminded that the Does had attempted to get the IG involved in the Does' case and were ignored, also is misleading at best.

The record in this case amply illustrates the excesses to which the Executive may be prone when it considers itself insulated from the obligation to comply with the law. The Court may find this record illuminating when considering whether this case is an appropriate vehicle in which to expand the scope of the Executive's unreviewable authority.

IV. CONCLUSION

This Court should reject the Executive's extreme position that the Executive Branch has absolute and unreviewable power to unilaterally terminate a judicial case alleging colorable constitutional claims. The Executive claims that courts are institutionally incapable of dealing with cases that touch upon matters of national security. History demonstrates the contrary, and the Court so ruled in *Reynolds*, *Hamdi*, and other cases. The Constitution prescribes to the Judiciary a coordinate obligation with the two other branches to protect an individual's constitutional right to due process. This Court should reject the Executive's attempt to create a new rule of judicial exclusion that concentrates Executive power in a manner that compromises the Judiciary's own constitutional obligations.

Totten does not command the result advocated by the Executive and neither does *Reynolds*, nor does the Constitution permit it. *Totten* is a privilege case, not a case authorizing denial of subject matter jurisdiction by Executive Branch fiat.

The record in this action demonstrates a complete lack of any risk to national security from the Does' case. Nothing has been or will be publicly filed in a court by the Does without prior approval by the CIA. Moreover, as a result of the CIA's belated admissions, it is now known that the standard governing the Does' case relates to their age, health and indigency and does not involve the details of espionage missions for the United States. Any concern over the confirmation of a relationship between the Does and the CIA is nullified by the Does' use of pseudonyms, a fact essentially admitted by the Executive. Any remaining concerns can be addressed by such procedures as having certain portions of

the district court proceedings *in camera* or under seal. Certainly nothing about the Does' case will require a public appearance by them. The Does have at least an equal interest in total security due to the remaining threat of retaliation, including assassination, posed by the Does' former country's secret service.

Should this Court affirm, the opinions below demonstrate that appropriate deference will be given to any assertion of the state secrets privilege by the Executive. The Ninth Circuit's decision specifically requires that the CIA be permitted to assert the state secrets privilege after remand and before any other case activity. The Ninth Circuit opinion also recognizes the possibility that the Does' case must yield to the greater good if the district court concludes, after assertion of the state secrets privilege, that the case cannot proceed without disclosing state secrets. But for now, in the absence of an assertion of the privilege by the Executive, the district court found, and the Ninth Circuit agreed, that it was *not* inevitable that the Does' case would disclose state secrets.

Respectfully, the Court should affirm and remand to the district court for further proceedings.

RESPECTFULLY
SUBMITTED,

Steven W. Hale
Counsel of Record
David J. Burman
Elizabeth A. Alaniz
Marie Aglion
Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
(206) 359-8000
Attorneys for Respondents